THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 2005-0480, The Cadle Company v. Maurice Bourgeois & a., the court on September 21, 2006, issued the following order:

The plaintiff, The Cadle Company, servicing agent for Cadle Properties of New Hampshire, Inc. (Cadle), appeals the superior court's ruling that defendant Dennis Proulx (Dennis) took the interest of defendant Maurice Bourgeois (Maurice) in Notre Dame Properties (NDP) free and clear of Cadle's unperfected security interest. We affirm.

The first question on appeal is whether the trial court exceeded our instructions when we remanded the case in Cadle Co. v. Bourgeois, 149 N.H. 410, 417 (2003). We conclude that the court did not exceed our instructions.

In Cadle, we reviewed the trial court's order denying Cadle's 2001 equity petition and granting Dennis' quiet title action. In its equity petition, Cadle had sought, among other things, to void the 1995 transfer from Maurice to Dennis of his one-half interest in NDP. Cadle, 149 N.H. at 413. The trial court ruled that because Maurice terminated his interest in the partnership before purporting to assign this interest to Cadle's predecessor-in-interest, St. Mary's Bank (bank), and before giving the bank a mortgage on his interest in the Laval Street property, his assignment to the bank and the bank's mortgage were nullities. Id. at 414. We reversed this ruling because we concluded that the partnership was, in fact, in existence when Maurice assigned his interest in the partnership to the bank and gave the bank the mortgage. Id. at 416.

We then considered "the effect of Maurice's 1995 assignment to Dennis and his associated withdrawal from the partnership on the 1994 collateral assignment and mortgage to the bank." Id. Based upon the record before us, we could not ascertain whether the partnership terminated in 1995 when Maurice withdrew from it and assigned his one-half interest in it to Dennis. Id. at 417. We therefore remanded to the trial court to make this determination. See id. We asked the trial court "to determine whether the 1994 collateral assignment of Maurice's partnership interest was compromised by his withdrawal from the partnership in 1995." Id.

We also remanded Cadle's request for a charging order. Id. We noted that the statute authorizing a charging order presupposes that a partnership exists. Id. Because we had already asked the trial court "to determine the effect of Maurice's 1995 withdrawal on the partnership, we also remand[ed] the question of the issuance of a charging order in the event the trial court determines that the 1995 partnership was not terminated." Id.

We did not remand the issue of whether Cadle still had a mortgage on the Laval Street property. Id. We determined that Cadle's mortgage still encumbered the property because it was recorded. Id.

Thus, the only issues on remand were the effect of Maurice's withdrawal in 1995 upon the 1994 assignment to Cadle, and whether a charging order should issue if the partnership had not terminated.

On remand, for the first time, Dennis argued that his 1995 assignment from Maurice had priority over Cadle's 1994 assignment because Cadle's security interest was unperfected and because he was a bona fide purchaser for value who lacked actual knowledge of the 1994 assignment. The trial court found that this issue was within the scope of our remand order because, before Cadle, "the issue of perfection was not 'put into play.'" The trial court noted that, before Cadle, it had ruled that the partnership terminated in 1992 and, therefore, Maurice's 1994 collateral assignment of his partnership interest to the bank was a nullity. Therefore, the court concluded, "the issue of perfection was not 'put into play' until the Cadle Court reversed the trial court's ruling that Maurice was [not] a partner in 1994, thereby giving effect to the collateral assignment of his partnership interest."

On appeal, Cadle asserts that the trial court erred when it permitted Dennis to raise perfection as an issue on remand. Cadle contends, in effect, that Dennis waived his right to raise this issue because he failed to raise it at the original trial. Dennis counters that he could not have raised perfection as an issue before remand because, "Throughout the December 2001 evidentiary trial, [he] proceeded on the assumption that Maurice had withdrawn as a partner . . . in late 1991 or early 1992, and that at the time of the 1994 collateral assignment . . . to [the bank], Maurice did not have a partnership interest . . . to convey."

Although we might have reached a different decision than the trial court were we deciding the issue in the first instance, we have no reason to disturb the trial court's balancing of the equities in this case. The court had to weigh permitting Dennis to raise a defense, which he may have waived because he did not raise it previously, against permitting Cadle to have priority even though its security interest was unperfected. We cannot say that the court unsustainably exercised its discretion by striking the balance that it did. Accordingly, we conclude that the trial court did not err by considering whether the 1995 assignment to Dennis had priority over the 1994 assignment to the bank because the bank's interest was unperfected and because Dennis was a bona fide purchaser who lacked knowledge of the 1994 assignment.

The second question on appeal is whether the trial court erred when it

decided that Cadle was not entitled to a charging order. The trial court ruled that Cadle was not entitled to a charging order because it found that Dennis, as a purchaser for value of Maurice's partnership interest without actual knowledge of the bank's security interest, took such interest free of the bank's unperfected security interest. We find no error in this ruling.

It is undisputed that the bank did not perfect its interest in the partnership. See RSA 382-A:9-302(1) (1994). RSA 382-A:9-301(1)(d) (1994), in effect at the time of the 1995 assignment to Dennis, provides that a purchaser for value takes free of an unperfected security interest if the purchaser was "without knowledge" of that interest. "Knowledge" as used in RSA 382-A:9-301(1)(d) means "actual knowledge." RSA 382-A:1-201(25) (1994). On appeal, Cadle concedes that "there is no clear evidence in the record that [Dennis] had actual knowledge of the collateral assignment to Cadle of [Maurice]'s interest before April 26, 1995." Cadle also concedes that "if [Dennis] is the sort of transferee which [RSA 382-A:] 9-301[(1)](d) was intended to protect, the language of [that statute] would permit him to take Maurice's NDP share free of Cadle's lien."

Cadle argues that, although there is no clear evidence that Dennis knew of the bank's security interest at the time of the 1995 assignment, Maurice's knowledge of the security interest should be imputed to Dennis because "[Maurice]'s knowledge is knowledge to the partnership." We disagree. Cadle's reliance upon Quinn v. Scheu, 675 P.2d 1078 (Or. Ct. App. 1984), is misplaced as Quinn is factually distinguishable. Quinn involved the perfected security interest of a company in the printing company with which the partner plaintiffs did business. Quinn, 675 P.2d at 1079. The issue on appeal was whether, when they were told of the company's perfected security interest, the plaintiffs had notice that paying anyone other than that company would violate the company's security interest. Id. at 1080. Moreover, in Quinn, both partners had actual knowledge of the company's perfected security interest, although one partner learned of it before the other. Id.

Cadle next asserts that the requirements of Article 9 of the Uniform Commercial Code do not apply to its unperfected interest in the partnership. We disagree for the reasons set forth in Dennis' brief.

Affirmed.

DALIANIS, DUGGAN and HICKS, JJ., concurred.

Eileen Fox,
Clerk